IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943

No. 311

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MURRAY B. McLEOD, Commissioner of Revenues of the State of Arkansas, Petitioner,

VS.

J. E. DILWORTH COMPANY and RIECHMAN-CROSBY COMPANY, Respondent.

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## SEPARATE BRIEF FOR RESPONDENT, J. E. DILWORTH COMPANY

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### STATEMENT OF THE CASE

The validity of Acts 154 of 1937, as Amended, and 386 of 1941, of the General Assemblies of the State of Arkansas as applied to the particular transactions here, is the subject of the controversy.

Respondent is a Tennessee Corporation with its principal place of business in Memphis, Shelby County, Tennessee, which is separated from Arkansas by the Mississippi River. It is not qualified to do business in Arkansas and has no sales offices or other places of business in said state.

(a)

Orders for machinery and mill supplies are procured in Arkansas, principally by two travelling representatives of Respondent, both domiciled in the City of Memphis, Tennessee, and who, as traveling representatives, cover in their regular routes of solicitation States other than Arkansas. All orders taken by the traveling salesmen are subject to the approval and acceptance of the Memphis Office, and the order forms so specify.

If the order is approved, and accepted by the Memphis Office, it is filled and shipped F.O.B. Memphis, Tennessee, title to the property being relinquished upon delivery to a common carrier. The traveling representatives have no authority to, and do not, collect accounts; their express authority being specifically limited to the solicitation of orders which must be subsequently approved and accepted by proper central office authorities. No title retaining contracts nor vendors lien notes are maintained in the State of Arkansas, and the only recourse Respondent possesses for the collection of its accounts is a claim for an open Accounts Receivable. The respondent is in the general interstate business.

(b)

Respondent receives orders by mail and telephone from customers in Arkansas, which, if accepted, are filled, and the merchandise delivered to a common carrier in Memphis, the purchaser paying the freight.

(c)

Respondent also makes sales of goods or merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business

in Memphis, which goods or merchandise are taken by the purchaser into the State of Arkansas for use or consumption (R. 2, 3).

Petitioner has summarized Respondent's position (Petitioner's Brief, Page 2).

The Supreme Court of the State of Arkansas concluded: (1) That the tax here involved is a sales tax; and (2), that as a sales tax it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in these cases: *McLeod v. J. E. Dilworth Co.* and *Riechman-Crosby Co.*, 171 S. W. (2d) 62 (*not yet officially reported*). In holding that the State could not impose and collect the tax, the effect is that the purchaser (against whom the tax is *imposed*) is not liable; hence the seller cannot be compelled to *collect*.

## SUMMARY OF ARGUMENT

**A. HISTORY OF THE TAX.**

**B. McGOLDRICK V. BERWIND AND COMPANION CASES DO NOT SUPPORT THE TAX.**

**C. A TAX LEVIED AND COLLECTED IN ARKANSAS FOR SOLICITING BUSINESS VIOLATES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.**

**D. THE TAX VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

## ARGUMENT

*(Italics Added)*

### A. HISTORY OF THE TAX.

Act 154 of 1937 levied a retail sales tax only. "There is no language whereby a use tax was levied or by which such fact might be determined by the actual or necessary implication." (*Mann v. McCarroll*, 198, *Ark.* 628). In *Mann v. McCarroll*, supra, the Commissioner of Revenues urged that a sales tax levied in Arkansas or sales made in another State, thereafter brought into Arkansas for consumption or use was void; "substantially the appellee (Commissioner of Revenues) argues that no sales tax could be levied on a sale made in another State which was thereafter to be brought into the State; that such a tax, that is, a sales tax on a sale made in another jurisdiction, would be an unwarranted burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U. S. C. A. Const. Art. I, Par. 8, Cl. 3, and, therefore, invalid." (*Mann v. McCarroll*, supra), and the Arkansas Supreme Court so held.

Act 386 of 1941, titled, "Gross Receipts Tax" is a retail sales tax substantially the same as Act 154 of 1937, which it repealed. (*McLeod v. Dilworth*, 171 *S. W.* (2d) *Page* 64).

Petitioner, Commissioner of Revenues, now wishes to reverse his former position and asserts that neither Act 154 of 1937 (originally argued contra) nor Act 386 of 1941, would be invalid when applied to sales made in other states, the property sold being subsequently consumed or used in Arkansas, since the "new doctrinal

trend" announced by this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 and companion cases.

## B. McGOLDRICK V. BERWIND-WHITE AND COMPANION CASES DO NOT SUPPORT THE TAX.

Certiorari was granted in the *McGoldrick v. Berwind*, supra case, upon a petition which challenged that the decision of the New York Supreme Court was not in accord with the decisions of this Court in *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210; 56 L. ed. 168, 32 S. Ct. 38; *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169; 79 L. ed. 838, 55 S. Ct. 358.

We maintain that the legal reasoning attached to *McGoldrick v. Berwind-White*, supra, and companion cases, is logical and easily reconciled with the thought attached to *Banker Bros. v. Pennsylvania*, supra, and *Wiloil Corp. v. Pennsylvania*, supra.

*Banker Bros. Co. v. Pennsylvania*, supra, turned on the proposition that a corporation *doing business* within the taxing territory was the actual vendor and not acting as agent for seller not doing business in the taxing State.

*Banker Bros. Co. was doing business in Pennsylvania where the contract was made by Banker Bros.* "Banker Bros. Co. had the title, and delivered it to the buyer on his paying the balance of the purchase money. Compare *Dozier v. Alabama*, 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Supreme Court Rep. 649."

The same principle is announced in *Wiloil Corp. v. Pennsylvania, supra, where the seller is doing business,*

*makes the contract and delivery in the taxing state.* This case also involves the application of the tax to property termed "original package" after it has come to rest in the taxing state, thus following the line of decisions holding valid a use tax on storage or withdrawment for use of gasoline after it has come to rest and commerce has ceased. *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 76 L. ed. 1233; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538; *Edelman v. Boeing Air Transport*, 289 U. S. 249, 77 L. ed. 1155; and *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257. Normally the type tax involved on transactions of this kind are occupational taxes levied for the privilege of taking the item from storage or placing the property through the channels of sale. This type tax is not in any degree an advalorem levy, but a privilege or excise tax and has always been held good because commerce, if the propetry was in commerce, has ceased. Likewise, we have a long line of decisions holding that a use tax or a levy for the privilege of consuming personal property, is valid. However, these taxes, in most instances, are enacted by State Legislative bodies, complementary to a sales tax. This tax, being a direct levy against the consumer for the use of tangible personal property, depends for its validity on the right of the State to levy an ad valorem tax of this nature because a tax for the use of the item is an exaction against the property itself.

But, since the decisions of *Banker Bros. Co. v. Pennsylvania*, supra, and *Wiloil Company v. Pennsylvania*, supra, it has been pointed out that it makes no difference whether the tax be on the use or consumption or a retail sales tax (that is, provided, of course, a use tax is valid

under the laws of the State levying the tax insofar as commerce is concerned, since no burden can be imposed after commerce has ceased. We do not quibble with this holding. The great bulk of personal property bought and sold has at some time been in commerce. Only a very few items are actually grown, manufactured or constructed and disposed of in the State of origin without passing in commerce. Therefore, if the Courts should hold that States could not levy taxes touching personal property that had at any time been in commerce, no doubt local governments would be almost wholly without property subject to being taxed.

In *Berwind-White*, supra, New York City levied a tax on receipts from sales *in the City of New York* "two percentum upon the amount of the receipts of every sale in the City of New York." (p. 43). *But in all these cases, including Banker Bros., supra, and Wiloil Corp., supra, the seller is doing business in the state where the delivery is made.* This also attached to all the companion and similar cases; *McGoldrick v. Felt & Tarrant Manufacturing Co., McGoldrick v. A. H. Du Grenier, Inc.*, 309 U. S. 70; *Nelson v. Sears Roebuck & Co., 312 U. S. 359, and Nelson v. Montgomery Ward & Co.*, 312 U. S. 373. The fact that sellers were not authorized to business did not change the situation.

The decisions of the Arkansas Supreme Court are identical. See *Mann v. McCarroll*, supra, and *McLeod v. Dilworth*, supra, where the seller *is not* doing business; and *Hollis & Co. v. McCarroll*, 200 Ark. 523, where the seller *is* doing business in Arkansas. The *Hollis*, supra, case, applies to Act 154 of 1937, the very Act

under question in this appeal. Compare this case to *Banker Bros. Co. v. Pennsylvania,* supra. They are almost identical, both factually and as to the declaration of law. Also note the Arkansas Supreme Court, when the *Hollis* case was decided, had before it this Court's decision in *McGoldrick v. Berwind-White,* supra, and companion cases, and the case was decided on the determinative law of this Court decreed in *McGoldrick v. Berwind-White,* supra. *But the Arkansas Supreme Court also had before it the McGoldrick v. Berwind-White case when the present case was decided. The law is the same, but the facts are not.*

The New York taxing Act is similar in most respects to the Arkansas Acts. Or perhaps we should say the Arkansas laws and regulations since the *Berwind-White* decision are very similar, indeed, to the New York Laws. Since the *Berwind-White* decision the Arkansas acts have been rehabilitated and remodeled by regulations promulgated by the Commissioner in order to mold the Arkansas Acts to fit the decision. So we can now assume for the present purpose that it falls upon us to distinguish the present case factually from the *Berwind-White,* supra case. Two distinguishing characteristics cause the law in *Berwind-White* to be inapplicable here.

*First*: *Berwind-White* maintained a place of business and actually transacted its business in New York City. Respondent has no place of business in Arkansas and transacts no business there.

*Second*: *Berwind-White's* contracts were entered into in New York City, where *Berwind* made local delivery causing the sale to be consummated there. Respondent's contracts were made in Memphis, Tennessee, where delivery was made, causing the sale to be consummated in Tennessee.

**"Doing Business"**

No question of "doing business" is presented in the *Berwind-White*, supra decision, since *Berwind-White* in New York, actually maintained a place of business, an inventory of merchandise for sale, and there received and accepted orders.

We find no general rule which will determine in all cases the sufficiency of activity of a corporation necessary to constitute "doing business." In the instant case the act of soliciting business is the only activity of Respondent through its agents which might be construed as "doing business." The determination of this question is for the State Courts where the action was brought. *Denver and R. G. R. Co. v. Rosler*, 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 738, and *Truck Hand v. Chicago and A. R. Co.*, 115 N. Y. 437; 22 Northeastern 360.

In a later section of this brief we will show there was no delivery in Arkansas by Respondent or anyone else. Therefore, if the transactions are to be taxed or if Respondent is to be held accountable for the collection and remittance, it must be because of its activity in soliciting business which brings us to the point of law upon which the State Supreme Court saw fit to turn its decision.

**C. A TAX LEVIED AND COLLECTED IN ARKANSAS FOR SOLICITING BUSINESS VIOLATES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.**

We assume for the purpose of arguing this point that the "taxable event" is the act of soliciting business.

The Arkansas Supreme Court has consistently held that a foreign corporation would not be "doing business" in

Arkansas unless the general nature and character of its activities was such as to warrant an inference that its transactions were intra state in character and it had subjected itself to local jurisdiction. *Sillin v. Hessig-Ellis Co.*, 181 Ark. 386. Here the Court quotes and approves from 60 A. L. R. p. 996 "the soliciting of orders for goods within a state by the agent of a foreign corporation and the shipment of goods pursuant to such orders by the corporation from another state to the purchaser do not constitute doing business within the State, so as to subject the corporation or its agent to a local statute prescribing conditions of doing business within the State; since such transactions are in interstate commerce and are not subject to regulations by the State." Also, in *Coblentz and Logsdon v. L. D. Powell Company*, 148 Ark. 151, quoting from the opinion, p. 155: "The contract for the sale of these books was consummated when the order therefor was accepted by the appellee at its home office in a foreign state and the books delivered there to the transportation company for shipment to appellants."

*L. D. Powell Co. v. Roemtell*, 157 Ark. 123;
*S. B. Wilson Telephone Co. v. John A. Roebling's Sons Co.*, 159 Ark. 635;
*Crawford v. Louisville Silo & Tank Co.*, 166 Ark. 91;
*H. J. Heinz Co. v. Duke*, 169 Ark. 180;
*Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79;
*Rogers v. Arkansas*, 227 U. S. 401;
*Linograph Co. v. Lazon*, 175 Ark. 194.

If it is necessary for the seller to be "doing business" in the State to such a degree as to come under the Act, we submit that the question of "doing business" is a question of local law and the Arkansas Supreme Court in

holding as it did, that is, the tax would be a burden on interstate commerce if imposed and collected under the facts, held the Respondent was not "doing business." Such logic springs from the fact that if the Arkansas Supreme Court believed Respondent was "doing business" interstate commerce would not be involved. Precisely the holding of the Arkansas Court in *Hollis & Co. v. McCarroll*, supra, where the seller was "doing business" hence no violation of the Commerce Clause of the Federal Constitution.

This Court has always been committed to the doctrine that a State Tax levied on the privilege of soliciting business by a foreign agent or corporation would infringe the Commerce Clause. *Robbins v. Taxing District*, 120 U. S. 489, 30 L. ed. 694; *Rogers v. Arkansas, Supra; Crenshaw v. Arkansas*, 227 U. S. 389; *Western Oil Refrigerator Co. v Lipscomb*; 244 U. S. 346, *Stockyard v. Morgan*, 185, U. S. 27; *Dozier v. Ala.* 218 U. S. 124; and many other cases.

Commerce was contemplated when the orders were taken by Respondent's agent. This still seems to be the test. *Crenshaw v. Arkansas*, supra. See also the case of *Emert v. Missouri*, 156 U. S. 296, where the agent was selling and delivering. This rule of law is plainly followed in *McGoldrick v. Berwind-White*, supra, and related cases. See also *Howe Machine Co. v. Gage*, 100 U. S. 676; *Baccus v. State of Louisiana*, 232 U. S. 334; and *Wagner v. Covington*, 251 U. S. 95. *But* these cases deal with selling and delivering tangible personal property which has been the law for a century when applying local privilege taxes to itinerant vendors or peddlers, and are certainly inapplicable to soliciting orders by an agent of a foreign corporation.

Respondent seeks no protection from the laws of the State of Arkansas and consequently is not "doing business" in said State to such a degree either with or without authority as to entitle the State to require it to collect and remit taxes. Then, if the "taxable event" is soliciting business, respondent is not accountable. This moves us to the next point of discussion.

## D. THE TAX VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Respondent's contracts were entered into in Memphis, Tennessee, where delivery was made, causing the sale to be consummated there. It is urged by petitioner that as in the *McGoldrick v. Berwind-White*, supra, case the tax here is dependent upon a *local activity* delivery of goods within the state upon their purchase for consumption. But delivery is a part of the contract of sale and delivery to the purchaser is completed in Tennessee. It is stipulated that title passed to the purchaser in Tennessee where delivery is made to the purchaser's agent, a common carrier. If this was not stipulated it is the law that delivery by a vendor to a common carrier is delivery to the vendee. "While according to common usage, delivery by a vendor to a carrier is, in the absence of a special agreement to the contrary, delivery to the vendee." *U. S. v. Andrews*, 207 U. S. 229; *Louisville & N. R. Co. v. U. S.* 267 U. S. 395; *D. L. & W. Ry Co. v. U. S.*, 231 U. S. 363.

A State cannot tax property beyond its jurisdiction without violating the due process clause of the Fourteenth Amendment. *Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194; *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83; *Frick v. Penn.*, 268 U. S. 473; *James v. Dravo*

*Contracting Co.*, 302 U. S. 134; *Hans Rees' Sons v. N. C.*, 283 U. S. 123; *Shaffer v. Carter*, 252 U. S. 37; *Surplus Trading Co. v. Cook*, 281 U. S. 647.

If the "taxable event" is the local activity delivery of the tangible personal property which is maintained by Petitioner and supported by the *McGoldrick v. Berwind-White*, supra, case, then, in this event the State of Tennessee, only can tax these transactions.

## CONCLUSION

If the "taxable event" is the act of solicitation, the tax cannot be enforced because it would infringe the Commerce Clause of the Constitution. *Robbins v. Taxing District*, supra. If the "taxable event" is the local activity delivery, Arkansas could not collect the tax because of the violation of the Due Process Clause of the Fourteenth Amendment. *Union Refrigerator Transit Co. v. Kentucky*, supra. There are no other "taxable events" here.

Therefore the purchaser is not liable for the tax. Under no condition could the seller be held accountable, for there are no decisions by the United States Supreme Court requiring foreign corporations to collect the type of tax herein involved where they employ only travelling salesmen to solicit orders subject to confirmation at the home office.

In any event, the Arkansas Supreme Court has not construed its taxing acts to include the transactions herein involved. This question was raised and urged below and the case is now properly remandable for this clarification. *Standard Oil Co. of California v. Johnson*, 316 U. S. 481;

*Query v. U. S.*, 316 U. S. 486; *Patterson v. Alabama*, 294 U. S. 600; *Minn. v. National Tea Company*, 309 U. S. 551.

*McGoldrick v. Berwind-White* points out there is no distinction between a tax on property and the sum of the rights and powers incorporated to ownership and the taxation of the exercise of some of its constituent elements. *Henneford v. Silas Mason Co.*, 300 U. S. 577; *Nashville C. St. L. R. Co. v. Wallace*, 288 U. S. 249. If coal was so situated as to be subject to a state property tax (*Brown v. Houston*, supra; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577) the transfer or purchase was equally as taxable as the storage or use. In other words, since there was no prevailing general ad valorem personal property tax, (which Arkansas has), the tax could be levied. If the tax is a property tax the local courts should construe its validity.

We urge that the judgment of the Supreme Court of Arkansas should be affirmed in holding that a sales tax levied and collected under the facts herein, violated the Commerce Clause, and that in addition the Due Process Clause is violated.

Respectfully submitted,

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